A

SERAC ASIA SDN BHD

v.

SEPAKAT INSURANCE BROKERS SDN BHD

B

FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ABDULL HAMID EMBONG FCJ
ZALEHA ZAHARI FCJ
C ZAINUN ALI FCJ
[CIVIL APPEAL NO: 02(i)-60-08-2012(W)]
27 JUNE 2013

D ***CIVIL PROCEDURE:*** *Appeal - Law, question of - Party seeking to impeach judgment on allegation of fraud - Whether judgment regularly obtained - Whether judgment could be struck out ex debito justitiae only in exceptional circumstances - Whether court functus officio once regularly obtained judgment perfected - Whether impeachment of judgment could be made vide affidavit evidence - Whether party seeking to impeach on fraud*
E *must file fresh action*

CIVIL PROCEDURE: *Striking out - Application for - Party seeking to impeach judgment on allegation of fraud - Whether court was functus officio in relation to judgment - Whether impeachment of judgment could*
F *be made vide affidavit evidence - Whether party seeking to impeach on fraud must file fresh action*

INSURANCE: *Insurance broker - Liability under a policy - Claim against professional insurance broker for failure to arrange proper insurance coverage - Whether cause of action arose in contract or tort - Whether*
G *insurer broker could be liable under insurance policy - Whether insurance broker owed duty of care to assured*

INSURANCE: *Insurance broker - Liability under a policy - Insurable interest - Whether assured has insurable interest - Whether insurable*
H *interest could be established by ownership, possession or direct relationship to subject matter of insurance - Whether insurable interest need to be shown for action under tort of negligence*

TORT: *Negligence - Professional negligence - Claim against professional*
I *insurance broker for failure to arrange proper insurance coverage - Whether cause of action arose in contract or tort - Whether insurer broker could be liable under insurance policy - Whether insurance broker owed duty of care to assured*

The appellant, the owner of an aircraft, Beach Baron, of which the insurance cover was handled by the respondent as insurance brokers, informed the respondent that it was intending to purchase another aircraft, a Cessna 421B. The respondent recommended that the insurance cover for the Cessna aircraft be done by way of an endorsement on the Baron aircraft insurance policy. Pursuant thereto, the respondent caused to be issued an insurance certificate for the Cessna and the appellant paid the additional premium. During the ferry flight of the Cessna from the USA to Malaysia, when the appellant was doing a test on the aircraft, the brakes malfunctioned causing the Cessna to crash into the hangar doors and another aircraft. Following the accident, the appellant requested the respondent to process the insurance claim in relation to the damages suffered arising from the accident. However, the respondent failed to do so and later informed the appellant that the insurers had repudiated liability over the accident. The appellant's request for the respondent to attend to the repairs went unheeded and thus the appellant issued a writ of summons against the respondent, claiming for damages arising from the alleged negligence of the respondent under the insurance agreement. The respondent failed to enter an appearance resulting in the appellant obtaining a judgment in default on the suit. The respondent then, *vide* encl. 6, filed an application to set aside the default judgment, which was dismissed by the Deputy Registrar and subsequently by the judge. Upon appeal to the Court of Appeal, the default judgment was maintained in respect of liability and the matter was referred back to the High Court of assessment of damages. Subsequent application for leave to appeal by the respondent was dismissed by the Federal Court. When the matter was fixed for hearing on the assessment of damages, the respondent filed an application ('encl. 29') to strike out the suit on the basis that the appellant had committed fraud in not revealing to the court that the Cessna aircraft was actually registered in the name of another company *ie*, Sprint Air Inc and sought to adduce fresh evidence. The respondent averred that the appellant could not maintain its suit since it lacked *locus standi* and had no insurable interest in the Cessna. The High Court allowed the respondent's application in encl. 29 resulting in the striking out of the appellant's writ and statement of claim. The appellant's appeal to the Court of Appeal was dismissed. The appellant subsequently succeeded in its application for leave from the Federal Court for the examination of the following questions of law: (i) can a suit wherein a judgment had been held valid by the

A Court of Appeal and the Federal Court be subsequently struck out summarily by the High Court and whether the court was *functus officio* in relation to a judgment which had been entered in the same suit; (ii) whether a High Court could impeach a judgment based on an allegation of fraud in the same proceedings
B in an application in chambers *vide* affidavit evidence; (iii) whether a party seeking to impeach a judgment based on fraud must file a fresh action and prove the alleged fraud and the burden of proof required; (iv) does an assured have a cause of action against their insurance broker in contract and tort for professional negligence
C and breach of duty of care in arranging the insurance needs of the assured for an aircraft to be purchased by the assured; and (v) does a question of insurable interest arise in a claim by the assured against the insurance brokers based on negligence as opposed to a claim by the registered owner of the aircraft against
D the final insurers.

Held (allowing appeal with costs; setting aside encl. 29)
Per Abdull Hamid Embong FCJ delivering the judgment of the court:

E **(1)** It is settled law that the High Court cannot set aside a final judgment/order regularly obtained from another High Court unless the judgment was made in defiance of a substantive statutory prohibition which renders it null and void on the
F grounds of illegality or lack of jurisdiction. Only in exceptional cases can a defective judgment be struck out *ex debito justitiae*. (para 31)

(2) The court in *Badiaddin Mohd Mahidin & Anor v. Arab-Malaysian Finance Bhd* ('*Badiaddin*') merely reaffirmed the rule
G that an earlier judgment can only be impeached when it is prohibited by statute and did not extend the inherent jurisdiction of the court to correct a perfected order or judgment beyond any statutory prohibition. The phrase "to intervene and correct a serious defect in the order" in
H *Badiaddin* should be read in the context of where an order was obtained in a manner which contravened a statute, resulting in that order being illegal or made outside the jurisdiction of the court. It was in this respect that the court's inherent jurisdiction may be exercised, to strike out an earlier
I order, *ex debito justitiae* and without the need for filing of a fresh suit. (para 35)

(3) As regards the issue of the court being *functus officio* and that a fresh suit needed to be filed to strike out a previous regularly obtained order on the ground of fraud, the court adopted the decision of *Hock Hua Bank Bhd v. Sahari Murid* where the court held that "a fresh action will lie to impeach the original judgment and the court had no power under any application in the same action to alter, vary or set aside a judgment regularly obtained". Fraud on the court is obviously a serious allegation that requires a higher standard of proof, one beyond reasonable doubt. The qualifying phrase "if clearly proved" in *Jonesco v. Beard*, governs the manner on how fraud should be proved. Based on the authorities, there was a need for a fresh action to adjudicate the issue. (paras 36, 37 & 38)

(4) The so-called misrepresentation or suppression of evidence, as found by the courts below, as to the ownership of the Cessna aircraft was a disputed issue. The appellant had adduced opposing evidence to show that the respondent knew from inception that the Cessna aircraft was registered in the name of Sprint Air Inc. It required a *viva voce* inquiry rather than determination merely by way of affidavit evidence since the factual disputes were obvious and could only be resolved in a trial with examination of witnesses for the court to make definite findings of facts. (para 39)

(5) The very filing of encl. 29 was inherently defective and unknown under the Rules of the High Court 1980 and should have been summarily dismissed by the High Court. Further, having considered the antecedents to encl. 29, the application for the admission of fresh evidence was misguided. If the affidavits of both parties had been carefully considered, it would have been clear that the so-called fresh evidence was not new and readily available with little earnest effort by the respondent. (paras 42 & 43)

(6) Once a regularly obtained order or judgment has been perfected, the court is *functus officio*. The matter as decided *vide* encl. 6 was thus *res judicata* and could not be relitigated. It needed to be emphasised that the order made under encl. 6 was appealed and affirmed right up to the Federal Court. It could not now be revisited or reasserted under any guise in a subsequent proceeding. The issues raised by the

respondent in encl. 29 could have been brought up during the appeal process. The law does not allow the respondent to have a second bite of the cherry and in the manner as it did. (para 44)

(7) The respondent, being an insurance broker and not an insurer, could not be liable for any damages the appellant had with it under an insurance policy. However, the claim for damages by the appellant against the respondent was under tort, for which the respondent owed a duty of care. The respondent, as a professional broker whose expertise was relied upon, was liable to the appellant for professional negligence in not arranging a proper insurance coverage for the Cessna aircraft resulting in the insurer disclaiming liability and refusing to indemnify the appellant's loss. The answer to question 3 was thus in the positive. (paras 45 & 46)

(8) The determination of whether the appellant had any insurable interest was not dependent on it being the legal owner of the aircraft alone. Insurable interest can be established either by ownership, possession or direct relationship to the subject matter of the insurance. Thus, one has an insurable interest if by taking out an insurance policy one gains a benefit from the preservation of that subject matter or suffers a disadvantage should it be lost. The case of *Standard Chartered Bank v. KTS Sdn Bhd* held that the interest in the insured property is not confined to just a legal interest *per se*. However, the claim by the appellant against the respondent was under tort, based on the latter's negligence for its failure to exercise reasonable skill and care as a licensed insurance broker, and not under the insurance policy in which the prerequisite of an insurable interest needed to be shown by the claimant. Thus, question 5 need not be answered. (para 47)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, pemilik sebuah pesawat, Beach Baron, yang perlindungan insuransnya dikendalikan oleh responden sebagai broker insurans, memberitahu responden bahawa ia berniat untuk membeli sebuah lagi pesawat, Cessna 421B. Responden mencadangkan bahawa perlindungan insurans bagi pesawat Cessna dibuat secara pengindorsan ke atas polisi insurans pesawat Baron. Berikutan itu, responden menguruskan pengeluaran sijil insurans bagi Cessna dan

perayu membayar premium tambahan. Semasa penerbangan membawa Cessna dari USA ke Malaysia, apabila perayu melakukan ujian ke atas pesawat tersebut, breknya rosak menyebabkan Cessna melanggar pintu hangar dan sebuah pesawat yang lain. Berikutan kemalangan tersebut, perayu meminta responden memproses tuntutan insurans berkaitan dengan kerugian yang dialami akibat daripada kemalangan tersebut. Walau bagaimanapun, responden gagal berbuat demikian dan kemudian memberitahu perayu bahawa syarikat insurans telah tidak mengakui liabilitinya terhadap kemalangan tersebut. Permintaan perayu untuk responden mengendalikan pembaikan juga tidak diendahkan dan dengan itu perayu mengeluarkan writ saman terhadap responden, menuntut ganti rugi yang berbangkit daripada kecuaian yang didakwa dilakukan oleh responden di bawah perjanjian insurans tersebut. Responden gagal memasukkan kehadiran yang menyebabkan perayu memperoleh penghakiman ingkar guaman tersebut. Responden kemudian, melalui lamp. 6, memfailkan permohonan untuk mengenepikan penghakiman ingkar tersebut, yang ditolak oleh Timbalan Pendaftar dan kemudian oleh hakim. Atas rayuan ke Mahkamah Rayuan, penghakiman ingkar dikekalkan berkaitan dengan liabiliti dan perkara tersebut dikembalikan ke Mahkamah Tinggi bagi pentaksiran ganti rugi. Permohonan untuk kebenaran selepas itu oleh responden ditolak oleh Mahkamah Persekutuan. Apabila perkara tersebut ditetapkan untuk perbicaraan pentaksiran ganti rugi, responden memfailkan permohonan ('lamp. 29') untuk membatalkan guaman tersebut atas alasan bahawa perayu telah melakukan fraud kerana tidak membuat pendedahan kepada mahkamah bahawa pesawat Cessna adalah sebenarnya didaftarkan atas nama sebuah syarikat yang lain iaitu Sprint Air Inc dan memohon untuk mengemukakan keterangan baru. Responden menyatakan bahawa perayu tidak boleh mengekalkan guamannya kerana ia tiada *locus standi* dan tiada kepentingan yang boleh diinsuranskan terhadap Cessna. Mahkamah Tinggi membenarkan permohonan responden dalam lamp. 29 menyebabkan pembatalan penyata tuntutan dan writ perayu. Rayuan perayu ke Mahkamah Rayuan ditolak. Perayu kemudian berjaya dalam permohonannya untuk kebenaran dari Mahkamah Persekutuan bagi penilaian persoalan-persoalan undang-undang yang berikut: (i) bolehkah suatu guaman di mana penghakiman diputuskan sah oleh Mahkamah Rayuan dan Mahkamah Perusahaan boleh kemudiannya dibatalkan secara terus oleh Mahkamah Tinggi dan sama ada mahkamah telah *functus officio* berkaitan dengan penghakiman yang telah dimasukkan dalam guaman tersebut; (ii) sama ada Mahkamah

A B C D E F G H I

A Tinggi boleh mencabar sesuatu penghakiman berdasarkan kepada dakwaan fraud dalam prosiding yang sama dalam permohonan dalam kamar melalui keterangan afidavit; (iii) sama ada pihak yang memohon untuk mencabar penghakiman berdasarkan fraud mesti memfailkan tindakan baru dan membuktikan dakwaan fraud dan
B beban pembuktian yang diperlukan; (iv) adakah pengambil insurans mempunyai kausa tindakan terhadap broker insurans dalam kontrak dan tort bagi kecuaian profesional dan kemungkiran kewajipan berjaga-jaga dalam menguruskan keperluan insurans pengambil insurans bagi pesawat yang dibeli oleh pengambil insurans; dan (v)
C adakah persoalan kepentingan yang boleh diinsuranskan timbul dalam tuntutan oleh pengambil insurans terhadap broker insurans berdasarkan kecuaian dan bukannya tuntutan oleh pemilik berdaftar pesawat tersebut terhadap syarikat insurans.

D **Diputuskan (membenarkan rayuan dengan kos; mengenepikan lamp. 29)**
Oleh Abdull Hamid Embong HMP menyampaikan penghakiman mahkamah:

E **(1)** Adalah undang-undang matan bahawa Mahkamah Tinggi tidak boleh mengenepikan penghakiman/perintah terakhir yang diperolehi mengikut aturan daripada Mahkamah Tinggi satu lagi kecuali penghakiman tersebut dibuat dalam keingkaran larangan statutori yang substantif yang menjadikannya batal dan tidak
F sah atas alasan ketaksahan atau ketiadaan bidang kuasa. Hanya dalam kes luar biasa sesuatu penghakiman yang cacat boleh dibatalkan *ex debito justitiae*.

(2) Mahkamah dalam kes *Badiaddin Mohd Mahidin & Anor v Arab-Malaysian Finance Bhd* ('*Badiaddin*') mengesahkan peraturan
G bahawa penghakiman sebelumnya hanya boleh dicabar apabila ia dilarang oleh statut dan tidak melanjutkan bidang kuasa sedia ada mahkamah untuk membetulkan perintah atau penghakiman yang telah dimuktamadkan melampaui apa-apa larangan statutori. Frasa "untuk campur tangan dan
H membetulkan kecacatan serius dalam perintah" dalam kes *Badiaddin* perlu dibaca dalam konteks di mana perintah tersebut diperolehi dengan cara bertentangan dari statut, mengakibatkan perintah tersebut tidak sah atau dibuat di luar bidang kuasa mahkamah. Hanya dalam perkara ini bidang
I kuasa sedia ada mahkamah boleh dilaksanakan, untuk membatalkan perintah terdahulu, *ex debito justitiae* dan tanpa perlu memfailkan guaman baru.

(3) Berkaitan dengan isu mahkamah menjadi *functus officio* dan bahawa guaman baru perlu difailkan untuk membatalkan perintah yang diperolehi menurut aturan atas alasan fraud, mahkamah mengguna pakai keputusan dalam kes *Hock Hua Bank Bhd v. Sahari Murid* di mana mahkamah memutuskan bahawa "tindakan baru dibuat untuk mencabar penghakiman asal dan mahkamah tidak mempunyai kuasa di bawah apa-apa permohonan dalam tindakan sama untuk meminda, mengubah atau mengenepikan penghakiman yang diperolehi menurut aturan". Fraud terhadap mahkamah adalah jelas dakwaan yang serius yang memerlukan standard pembuktian yang tinggi, iaitu melampaui keraguan munasabah. Frasa melayakkan "jika jelas dibuktikan" dalam kes *Jonesco v. Beard*, menunjukkan cara bagaimana fraud perlu dibuktikan. Berdasarkan kepada autoriti-autoriti, terdapat keperluan bagi tindakan baru untuk memutuskan isu tersebut.

(4) Salah nyata atau penyembunyian keterangan yang didakwa, seperti yang didapati oleh mahkamah-mahkamah bawahan, berkaitan dengan pemilikan pesawat Cessna adalah isu yang dipertikaikan. Perayu telah mengemukakan keterangan menentang yang menunjukkan bahawa responden mengetahui sejak dari mula bahawa pesawat Cessna didaftarkan atas nama Sprint Air Inc. Ia memerlukan siasatan *viva voce* dan bukan dipertimbangkan semata-mata melalui keterangan afidavit kerana pertikaian fakta adalah jelas dan hanya boleh diputuskan dalam perbicaraan dengan pemeriksaan ke atas saksi-saksi untuk mahkamah membuat dapatan fakta yang pasti.

(5) Pemfailan lamp. 29 adalah jelas cacat dan tidak diketahui di bawah Kaedah-Kaedah Mahkamah Tinggi 1980 dan sepatutnya telah ditolak secara terus oleh Mahkamah Tinggi. Selanjutnya, selepas mempertimbangkan keadaan sebelum lamp. 29, permohonan untuk kemasukan keterangan baru adalah salah. Jika afidavit-afidavit kedua-dua pihak telah dipertimbangkan secara teliti, akan jelas bahawa keterangan baru yang didakwa bukanlah baru dan sememangnya boleh didapati dengan sedikit usaha oleh responden.

(6) Apabila perintah atau penghakiman yang diperolehi menurut aturan telah dimuktamadkan, mahkamah menjadi *functus officio*. Perkara yang diputuskan melalui lamp. 6 adalah dengan itu *res judicata* dan tidak boleh dibicarakan semula. Adalah perlu ditegaskan bahawa perintah yang dibuat di bawah lamp. 6

telah dirayu dan disahkan sehingga ke Mahkamah Persekutuan. Ia tidak boleh dibuka semula atau ditegaskan semula dalam apa-apa bentuk prosiding yang kemudian. Isu-isu yang dibangkitkan oleh responden dalam lamp. 29 sepatutnya dikemukakan semasa proses rayuan. Undang-undang tidak membenarkan responden peluang kedua dan dalam cara seperti yang dilakukannya.

(7) Responden, sebagai broker insurans dan bukan syarikat insurans, tidak bertanggungjawab bagi apa-apa kerugian yang dialami oleh perayu di bawah polisi insurans tersebut. Walau bagaimanapun, tuntutan untuk ganti rugi oleh perayu terhadap responden adalah di bawah tort, yang mana responden mempunyai kewajipan berjaga-jaga. Responden, sebagai broker profesional yang atas kepakarannya disandar, bertanggungjawab kepada perayu bagi kecuaian profesional kerana tidak menguruskan perlindungan insurans yang wajar bagi pesawat Cessna yang mengakibatkan syarikat insurans tidak mengakui liabiliti dan menolak untuk membayar ganti rugi terhadap kerugian perayu. Jawapan kepada soalan 3 dengan itu adalah berbentuk positif.

(8) Pemutusan sama ada perayu mempunyai apa-apa kepentingan yang boleh diinsuranskan tidak hanya bergantung kepada ia menjadi pemilik sah pesawat tersebut. Kepentingan yang boleh diinsuranskan boleh dibentuk sama ada melalui pemilikan, penyimpanan atau hubungan langsung dengan subjek perkara insurans tersebut. Oleh demikian, seseorang mempunyai kepentingan yang boleh diinsuranskan jika, dengan membeli polisi insurans ia memperolehi faedah daripada pemeliharaan subjek perkara tersebut atau mengalami kerugian jika ia hilang. Kes *Standard Chartered Bank v. KTS Sdn Bhd* memutuskan bahawa kepentingan dalam harta yang diinsuranskan tidak terhad kepada kepentingan undang-undang sahaja. Walau bagaimanapun, tuntutan oleh perayu terhadap responden adalah di bawah tort, berdasarkan kepada kecuaian responden atas kegagalan melaksanakan kemahiran dan jagaan yang munasabah sebagai broker insurans berlesen, dan bukan di bawah polisi insurans di mana prasyarat bahawa kepentingan yang boleh diinsurans perlu ditunjukkan oleh pemohon. Oleh demikian, soalan 5 tidak perlu dijawab.

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA ***(refd)***

Government of Malaysia v. Dato Chong Kok Lim [1973] 1 LNS 35 HC ***(refd)***

Henderson v. Henderson [1843] 3 Hare 100 ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(foll)***

Jonesco v. Beard [1930] AC 298 (HL) ***(refd)***

Ladd v. Marshall [1954] 1 WLR 1489 ***(refd)***

Lembaga Kumpulan Wang Simpanan Pekerja v. Kesatuan Kakitangan Lembaga Kumpulan Wang Simpanan Pekerja [2000] 3 CLJ 81 FC ***(refd)***

Ling Kuok Teck & Anor v. Tseng Choon Chin @ Tay Bak Hui & 5 Ors [1995] 3 CLJ 889 HC ***(refd)***

Price v. Stone [1964] VR 106 ***(refd)***

Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Interveners) [2000] 3 CLJ 16 CA ***(not foll)***

Standard Chartered Bank v. KTS Sdn Bhd [2006] 4 CLJ 79 FC ***(refd)***

Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 ***(refd)***

Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 CA ***(foll)***

Legislation referred to:

Insurance Act 1996, s. 2

Rules of the High Court 1980, O. 18 rr. 19(1)(a), (d), O. 42 r. 13, O. 56 r. 3A

Rules of Court 2012, O. 18 r. 19(1)(a)

Other source(s) referred to:

Halsbury's Laws of Malaysia, vol 4, para 60.034

For the appellant - K Jeyaraj (Ahmad Fadhli Salleh with him); M/s K Jeyaraj Fadhli Sin

For the respondent - Murali Menon (Noradilah with him); M/s Jaffar & Menon

[Editor's note: For the Court of Appeal judgment, please see Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2012] 9 CLJ 576.]

Reported by S Barathi

A

JUDGMENT

Abdull Hamid Embong FCJ:

[1] This case has an unusual history, as narrated by both counsel in their respective written submissions. Serac Asia, the plaintiff in the High Court (now appellant) issued a writ a summons against the defendant, Sepakat (now respondent), claiming for damages arising from the alleged negligence of the respondent under an insurance arrangement. The respondent failed to enter an appearance to that writ resulting in the appellant obtaining a judgment in default on the suit.

[2] The respondent then filed on application to set aside the default judgment on 28 April 2006 (encl. 6 in the High Court). This was dismissed by the Deputy Registrar on 22 June 2006, and later on appeal, by the judge on 10 October 2006.

[3] The respondent then appealed to the Court of Appeal which on 6 April 2010, maintained the default judgment in respect of liability and referred the matter back to the High Court for assessment of damages.

[4] The respondent's application for leave to appeal was dismissed on 18 August 2010 by the Federal Court.

[5] When the matter was fixed for hearing on the assessment of damages, the respondent filed an application (encl. 29) to strike out the suit based on fraud and lack of *locus standi* of the appellant and to adduce fresh evidence to prove the basis of the striking out application. Enclosure 29, it must be noted, is not a fresh action but a summons in chambers filed to strike out a regularly obtained judgment in default. In other words, it was an application to strike out a writ filed subsequent to a judgment. Enclosure 29 is the subject matter of the appeal now before us.

[6] On 14 October 2011 the High Court allowed the respondent's application *vide* encl. 29, resulting in the striking out of the appellant's statement of claim and writ. The effect of that decision was to nullify the previous order of the High Court in allowing for a judgment in default, which had been affirmed right up to the Federal Court.

[7] The appellant appealed to the Court of Appeal. Its appeal was dismissed on 8 March 2012.

[8] The appellant subsequently succeeded in applying for leave from the Federal Court which, on 7 August 2012, allowed the following five questions of law to be examined *viz*:

Q1: Can a suit wherein a judgment (in respect to liability) has been held valid by the Court of Appeal and Federal Court be subsequently struck out summarily by the High Court? Isn't the court *functus officio* in relation to a judgment which has been entered in the same suit?

Q2: Can a High Court impeach a judgment based on an allegation of fraud in the same proceedings in an application in chambers *vide* affidavit evidence?

Q3: Whether a party seeking to impeach a judgment based on fraud must file a fresh action and prove the alleged fraud and the burden of proof required?

Q4: Does an assured have a cause of action against their insurance broker in contract and tort for professional negligence and breach of duty of care in arranging the insurance needs of the assured for an aircraft to be purchased by the assured?

Q5: Does a question of insurable interest arise in a claim by the assured against the insurance brokers based on negligence or as opposed to a claim by the registered owner of the aircraft against the final insurers?

[9] It was common ground that:

(a) there is no dispute that the respondent was the insurance broker of the appellant;

(b) the appellant knew of the risks covered and paid the premium;

(c) there is no dispute that the Cessna aircraft is not yet repaired; and

(d) there is no dispute that the insurance policy and the cover note were extended under the appellant's name.

[10] The background facts which formed the basis of the appellant's claim are these:

10.1 The appellant owned an aircraft known as Beach Baron registration No: 9M-JJG, of which the insurance cover was handled by the respondent as insurance brokers since the year 2003. In July 2004, the appellant informed the respondent that it was intending to purchase another aircraft, a Cessna 421B registration number N700BC from the USA. As an insurance broker, the respondent recommended that the insurance cover for the Cessna aircraft be done by way of an endorsement on the Baron aircraft insurance policy. Pursuant thereto, the respondent caused to be issued an insurance certificate for the Cessna and the appellant paid the additional premium of RM46,589.34 to the respondent.

10.2 During the ferry flight of the Cessna from the USA to Malaysia, while it was at the Le Mans Airport in France on 28 April 2005, when the appellant was doing a test on the Cessna, the brakes malfunctioned causing the Cessna to crash into the hangar doors and another aircraft. Following that accident, the appellant had requested the respondent to process the insurance claim in relation to the damages suffered arising from the accident involving the Cessna but the respondent failed to do so and later informed the appellant that the insurers had repudiated liability over the accident.

10.3 The appellant then gave to the respondent a quotation for repairing the damage caused by the accident together with a notice that if the respondent failed to attend to the repairs, the appellant would be at liberty to do the repairs on the Cessna and that all expenses and damages would be claimed from the respondent. The respondent failed to respond and thus the appellant claimed for loss and damages arising from the accident involving the Cessna.

10.4 In its statement of claim, the appellant pleaded that it had depended upon the professional expertise and the representations of the respondent as insurance brokers for the handling of the insurance requirements of the Cessna and holds the respondent responsible in tort, to ensure that

the Cessna is properly and sufficiently insured at the material time. Specific particulars of negligence of the respondent as insurance brokers were pleaded. A

10.5 The appellant *vide* encl. 6, subsequently obtained a judgment in default when the respondent failed to enter an appearance to answer the claim. B

[11] The basis for respondent's striking out application in encl. 29 was that the appellant had committed fraud in not revealing to the court that the Cessna aircraft was actually registered in the name of another company ie, Sprint Air Inc, and not in the name of the appellant. C

[12] As a consequence, it was averred that the appellant could not maintain its suit since it lacked *locus standi* and had no insurable interest in the Cessna. D

[13] Before us, the appellant submitted that even if there were fresh evidence or fraud or any complaint causing a defect in the writ or cause of action, the respondent cannot apply to the High Court in the same proceeding after a regular default judgment had been confirmed and upheld by the Court of Appeal and the Federal Court, to set aside that judgment and strike out the entire writ summarily *vide* a summons in chambers application. E

[14] The appellant contended that the correct procedure would be for the respondent to file a fresh suit to impeach the earlier judgment. The fresh suit would then give an opportunity to the respondent to adduce the necessary evidence to prove the allegation that it had no knowledge that the Cessna's registration was in the name of Sprint Air Inc and to prove that the appellant had committed fraud on the court by its misrepresentations of facts. In a fresh suit, the appellant would then be availed the opportunity to defend itself in open court in the face of such allegation of fraud. F G

[15] It was submitted further that a matter having gone up to the apex court must be given credence and must not be set aside or struck out subsequently by a High Court, in a summary manner as happened here. Further, the High Court was already *functus officio* after it allowed the judgment in default. Thus it cannot now act to strike out the writ. H I

[16] In short, the appellant's complaint was in respect of the law and the correct procedure with regard to impeaching a regularly obtained judgment.

[17] Learned counsel for the respondent on the other hand contended that an action or claim can always be struck out when a cause of action does not exist in the first place and the High Court is not unjustified in dismissing an action proven to be scandalous, frivolous and vexatious or an abuse of its process.

[18] As regards the *functus officio* point, it was submitted that the application in encl. 29 should be distinguished from the former application (encl. 6) to set aside the default judgment, dated 28 April 2006.

[19] It was argued that the issue of the *locus standi* of the appellant by reason of its fraud in not disclosing a material fact *viz* that they are not the owner of the Cessna aircraft, was not a matter before the court during the hearing of encl. 6.

[20] The first three questions thus can be discussed together as they are related. In giving our opinion, we will simultaneously answer the questions posed without the need to address them individually with the usual yes or no answers. But first, let us consider further the respective arguments.

The Opposing Contentions:

[21] It was the respondent's contention that the court in deciding encl. 29 was not caught by the doctrines of *functus officio* and *res judicata*. Learned counsel for the respondent submitted that the door is not shut for the court to rehear the matter if special circumstances exist, as evinced by the following evidence, namely:

(i) the appellant's false pleading,

(ii) the unconscionable conduct of the appellant by its failure to disclose material facts, and

(iii) the challenge to the appellant's *locus standi* which will result in the dismissal of its suit, *in limine*.

[22] It was argued that in its encl. 29 application it had raised a new issue ie, that of the appellant's lack of *locus standi* by reason of fraud and non disclosure of a material fact that the appellant were not the owners of the Cessna aircraft.

[23] Reliance was placed on the following holdings of the Court of Appeal in the case of *Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Interveners)* [2000] 3 CLJ 16, to contend that the court, where it acted under special circumstances, is not *functus officio*, and that under its inherent jurisdiction the High Court is seised with powers to set aside or amend even a final order. The Court of Appeal in that case held, *inter alia*, that:

> (3) The extent of the court's inherent jurisdiction was extended by the Federal Court in *Badiaddin Mohd Mahidin & Anor v. Arab-Malaysia Finance Bhd* to allow the court unlimited jurisdiction to set aside orders: (i) where the order contravenes a substantive statutory prohibition rendering it defective on grounds of illegality of lack of jurisdiction; and (ii) where in exceptional cases, the justice of the case requires the court to intervene and correct a serious defect in the order.
>
> (4) Under the aforesaid circumstances, a court is seised of jurisdiction to set aside an earlier order *ex debito justitiae*, without a need to appeal or file a fresh suit. This can be done in the same proceedings and before the same judge or another judge of concurrent jurisdiction.
>
> (7) The justice of the case therefore entitled the interveners to apply to set aside the 1993 order in the same proceedings, and the High Court was not *"functus officio"* but could hear and determine the application under its inherent jurisdiction.

[24] The respondent also argued that in the case of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75, the Federal Court had held that apart from a situation where an earlier order contravened a substantive statutory prohibition rendering that order defective for illegality, there is in exceptional cases, a situation "where the justice of the case requires the court to intervene and correct an earlier order that contains a serious defect and there is a need to have it set aside" (see *Selvam Holdings* at p. 24 of the report). In such a situation which attracts the *ex debito justitiae* principle, it has been held that "there is no need to adopt the appeal procedure nor file a fresh suit to set aside a defective order". It can be done in the same proceedings under which the impeached order was granted.

[25] The appellant's conversely argued that a perfected judgment cannot be summarily struck out in the same action by way of a summons in chambers as was done for encl. 29 here. A fresh suit needs to be filed to impeach the order, even for an allegation based on fraud. The principles of *res judicata* and *functus officio* must apply. It was strongly argued by learned counsel that the court may exercise its inherent power to set aside a perfected order only in special circumstances limited to only one situation, namely, where the order was made in contravention of a statute. In support, this passage from *Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor* [2000] 1 CLJ 553; [2000] 1 MLJ 479, was cited to impress upon us that even in *Badiaddin* itself, the final order was set aside, *ex debito justitiae*, for being in contravention of statute. That passage reads:

> It is of importance to note that Badiaddin was a case in which the plaintiff brought a fresh action to rid himself of a final order made in contravention of the Malay Reservation Enactment (FMS Cap. 142). It was therefore an exceptional case, as the judgment of the Federal Court in that case make plain. We would observe that on its fact, the present appeal has none of the features that were present in *Badiaddin*'s case. At the risk of repetition, we say that this is not a case where an order had been made in defiance of a substantive statutory provision.

Findings Of The Court Of Appeal

[26] It was thus submitted that the Court of Appeal in this case had erred in deciding that the plea of *res judicata* does not apply because of the "existence of special circumstances". The Court of Appeal here held that the respondent should be allowed to re-litigate this matter because it is a "special case" due to the existence of fresh evidence. The Court of Appeal was satisfied that the evidence put forth by the respondent, as we earlier mentioned, formed a good basis for there to exist special circumstances so as not to shut the court's door to allow for the re-adjudication of the matter. The Court of Appeal had also found that the issue of *locus standi* of the appellant was not raised before by reason of the fraud by the appellant in not disclosing a material fact, ie, that it was not the owner of the Cessna aircraft. The matter before it was thus not caught by the *res judicata* principle. (*Government of Malaysia v. Dato Chong Kok Lim* [1973] 1 LNS 35; [1973] 2 MLJ 74 followed). The Court of Appeal in

concluding that this was a 'special case' for which *res judicata* is not applicable also relied on this passage from *Henderson v. Henderson* [1843] 3 Hare 100, stating:

> In trying this question, I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable, might have brought forward at the time.

[27] The Court of Appeal after a perusal of the facts from the supporting affidavits of the respondent, concluded that since the appellant lacked *locus standi* to commence this action, the respondent was therefore justified in its application to strike out the pleadings on the ground of no reasonable cause of action and an abuse of the court's process under O. 18 r. 19(1) of the RHC 1980. The Court of Appeal also found that the appellant had been guilty of committing fraud on the court.

[28] The reasons for the Court of Appeal's findings are as stated in these passages which we now reproduce.

On *locus standi*, the Court of Appeal said:

> [30] Since the plaintiff is not the registered owner of the Cessna aircraft, it has no *locus standi* to commence this suit against the defendant. Likewise the judgment in default should have been set aside and the whole action should be struck out for want of *locus standi* on the part of the plaintiff to initiate this proceeding.
>
> [31] The obvious effect of *locus standi* is to exclude the plaintiff from having access to the courts. The *locus standi* rule is a technique of exclusion to exclude the plaintiff from gaining access to the courts. The question of standing goes to the

jurisdiction of the court. In *Government of Malaysia v. Lim Kit Siang, United Engineers (M) Berhad v. Lim Kit Siang* [1988] 2 MLJ 12, SC Salleh Abas LP had this to say about *locus standi* at p. 20 of the report:

> Every legal system has a built-in mechanism to protect its judicial process from abuse by busy-bodies, cranks and other mischief–makers by insisting that a plaintiff should have a special interest in the proceedings which he institutes. This special interest is a nexus between him and the party against whom he brings his complaints to court and is known as *locus standi*.

[33] In short, the present plaintiff is the wrong litigant. The right litigant is Sprint Air Inc. The present plaintiff lacked standing to institute this claim against the defendant.

[34] The failure on the part of the plaintiff in disclosing the material fact pertaining to the ownership of the Cessna aircraft and using the court as a springboard to pursue its non *bona fide* claim amounted to an abuse of the process of the court. The court has the inherent jurisdiction to prevent an abuse of its process (*Raja Zainal Abidin Raja Takchik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 MLJ 16).

And, on the fraud point, it ruled that:

[36] … Here, it is plain and obvious that the judgment in default was obtained by the plaintiff based on a misrepresentation of fact and by fraud and that would entitle the defendant to set aside the judgment in default.

[37] By not revealing and disclosing the material fact that the Cessna aircraft was not registered in the plaintiff's name, and by not disclosing the relevant documents to show the legal ownership of the Cessna aircraft, the plaintiff had committed fraud towards this court.

[38] It is germane to mention that the crucial issue of the day revolved on the question of whether a judgment obtained by fraud may be treated as a nullity and may be impeached, set aside or rescinded. And flowing from it would be an equally crucial issue to decide and that would be whether the judgment in default would be rescinded on the ground of discovery of new evidence? The answers to these two questions are in the positive;

[29] And in conclusion, the Court of Appeal said this: A

> The fresh evidence questioned the *locus standi* of the plaintiff to institute this action and it centred on the legal ownership of the Cessna aircraft which is the subject matter of this suit. It showed that the Cessna aircraft is registered under the name of Sprint Air Inc. and the defendant only came to know of this fact after the bundle of documents for the assessment of damages was forwarded to the defendant on 20 May 2011. In our judgment, the plaintiff has no insurable interest and that interest is vested in Sprint Air Inc. And the damages were also suffered by Sprint Air Inc. and not the plaintiff. The defendant is also not the tortfeasor to Sprint Air Inc. In our judgment, the defect to the plaintiff's writ of summons and the statement of claim was so fundamental that it ought to be struck out fortwith. B C

[30] Having perused the judgment of the Court of Appeal, it seems to us, with respect, that only the evidence as found in the supporting affidavit of the respondent was considered by the Court of Appeal. (The Court of Appeal never alluded to the opposing affidavit stating that the appellant never claimed that the Cessna aircraft was registered in its name). It was also a disputed fact that the respondent knew right from the outset that the Cessna aircraft was registered in the name of another company ie, Sprint Air Inc. The appellant also averred that there was no justification to allow for the admission of fresh evidence as applied for by the respondent *vide* its encl. 29. In short it was the appellant's contention that the *Ladd v. Marshall* [1954] 1 WLR 1489, conditions were not met to allow for the admission of those so-called fresh evidence, since those evidence were already available or could be obtained with a little exercise of diligence by the respondent. D E F G

Our Findings

[31] It is settled law that the High Court cannot set aside a final judgment/order regularly obtained from another High Court unless the judgment was made in defiance of a substantive statutory prohibition which renders it null and void on the grounds of illegality or lack of jurisdiction. Only in that exceptional case can a defective judgment be struck out *ex debito justitiae*. It is thus only in this situation that a High Court may exercise its inherent jurisdiction to strike out a regularly obtained judgment of another court of concurrent jurisdiction. (see: *Badiaddin*'s case) H I

[32] The Court of Appeal in *Selvam Holding* said that besides the situation above, *Badiaddin* seemingly had "extended the scope and extent of the inherent and discretionary jurisdiction of a court" to set aside an order "where in exceptional cases, the justice of the case requires the court to intervene and correct an earlier order that contains a serious defect and there is a need to have it set aside".

[33] We have carefully re-examined *Badiaddin* and could not find anywhere in its ratio to say that the court's inherent jurisdiction has an extended scope to correct an earlier regular judgment or order in exceptional circumstances other than where the judgment had been granted in contravention of a statute.

[34] The *dicta* of all the three learned judges can be seen from the headnotes of the report. What is obvious is the unanimity of Their Lordships' opinions on when the inherent jurisdiction of the court can be invoked in striking out a previous perfected judgment or order.

per Azmi FCJ:

The Court of Appeal, in allowing the respondent's appeal, had failed to appreciate the central argument on the availability of the inherent jurisdiction of the High Court to exercise its discretion to set aside the illegal attempt by the respondent to subvert and effectively reverse the original, final and perfectly legitimate order of the High Court, as a special exception to the doctrine governing the finality of court orders, notwithstanding the absence of any appeal. The learned judges had failed to direct their minds to the fundamental issue of whether the appellants' application came within the category of cases that attracted *ex debito justitiae*. The second order for sale of the land, which had the effect of an attachment in execution of a judgment, was null and void being in violation of the prohibition imposed by s. 13 of the Enactment. Thus, that order being in violation of a statutory prohibition, it followed that the High Court should have the inherent jurisdiction to set aside the second illegal order on the basis of the *ex debito justitiae* principle.

per Peh Swee Chin FCJ:

When a judgment in the High Court has been perfected, a party to the judgment generally, and subject to the same passage or any written law, and par from any appeal, cannot re-open the matter finalized in the judgment by seeking to alter it or amend it for

the court would be *functus officio* by virtue of the ratio of *Hock Hua Bank v. Sahari Murid*. Once perfected, a judgment of the High Court is also entitled to the obedience and respect from the parties to it on the basis of a command from a superior court of unlimited civil jurisdiction in the course of contentious litigation. It is also long established that one can apply to set aside an order of a superior court only in direct proceedings filed for the very purpose of having it set aside on valid grounds, but without doing so, one cannot attack its invalidity laterally by raising an objection to its invalidity in any other proceedings, without filing proceedings for applying to have it set aside first.

per Gopal Sri Ram JCA:

As a general rule orders of a court of unlimited jurisdiction may not be impugned on the ground that they are void in the sense that they may be ignored or disobeyed. It is well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. So long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is entirely open to the court upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal. It is clear that in the light of the principles established, that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law. The ends of justice will not be met if such a power does not exist; and the procedural branch of the broad and flexible doctrine of estoppels known as *res judicata* finds no place in such a circumstance. Neither has the *functus officio* theory, which upon close examination is merely part and parcel of the doctrine of *res judicata*, any role to play in the case.

[35] We are thus in agreement with the appellant's stand that an earlier judgment can only be impeached when it is prohibited by statute; and that *Badiaddin* to us merely reaffirmed that rule and does not extend the inherent jurisdiction of the court to correct a perfected order or judgment beyond any statutory prohibition. This established rule was explained in *Tenaga Nasional* which we had earlier adverted to. In our view, that part of the holding of the Court of Appeal in *Selvam Holdings* should not be interpreted

as giving the courts a broad power to set aside a previous perfected orders under the guise of "exceptional cases". We think that the *Badiaddin*'s phrase "to intervene and correct a serious defect in the order" should be read in the context of where an order was obtained in a manner which contravened a statute, resulting in that order being illegal or made outside the jurisdiction of the court. It is in this respect that the court's inherent jurisdiction may be exercised, to strike out an earlier order, *ex debito justitiae* and without the need for file a fresh suit.

[36] As regards the appellant's submission on the court being *functus officio* and that a fresh suit needs to be filed to strike out a previous regularly obtained order on the ground of fraud, we adopt the finding of this court in *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 14 which we think has settled these issues. The headnotes from the report in that case, which need no further explanation, or expansion, is now reproduced as our answer to those related questions:

> In this case the learned judge had made an order for sale in a foreclosure proceeding. The order was made after hearing all the parties and was made despite a claim of *non est factum* and allegations of fraud and forgery by the respondent. The order was drawn up and perfected. There was no appeal against it. The respondent applied to set aside the judgment and this application was refused. Subsequently the respondent applied again to set aside the previous orders. The learned judge thereupon set aside his order. The appellant appealed.
>
> Held:
>
> (1) the learned judge was *functus officio*;
>
> (2) the court had no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it had been entered or an order after it has been drawn up, except under the slip rule, so far as is necessary to correct errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing;
>
> (3) if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment;

(4) in this case the learned judge had no jurisdiction to set aside his own order and the original order must be restored, leaving it to the respondent to take out a fresh action to set aside the order on the ground fraud.

[37] Although both the courts below had referred to the cases of *Ling Kuok Teck & Anor v. Tseng Choon Chin @ Tay Bak Hui & 5 Ors* [1995] 3 CLJ 889 and the *Hock Hua Bank Bhd (supra)*, which cases involved applications to impeach perfected judgments previously obtained on the grounds of fraud or non-disclosure of material documents, both the courts unfortunately missed to observe that in both cases **fresh actions** were filed to trash out the issue of fraud. In fact, Chang Min Tat FJ speaking for the Federal Court in the latter case, clearly stated that a "fresh action will lie to impeach the original judgment", and that the court had "no power under any application **in the same action** to alter, vary or set aside a judgment regularly obtained". (emphasis added)

[38] Fraud on the court is obviously a serious allegation. It requires that higher standard of proof, one of beyond a reasonable doubt. In *Jonesco v. Beard* [1930] AC 298 (HL), Lord Buckmaster observed that "fraud is an insidious disease, and if clearly proved to have been used so that it might deceive the court, spreads to infect the whole body of the judgment". The qualifying phrase "if clearly proved" to us governs the manner on how fraud should be proved. In *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321, it was held that a judgment may be impeached only for a "deliberate fraud practiced upon the court" and that it is "insufficient to show that a litigant merely convinced the court through misleading or erroneous evidence" (see the Australian case of *Price v. Stone* [1964] VR 106). It has been otherwise described as "cheating to get an advantage". Thus, to us, there is a need for a fresh action to adjudicate the issue.

[39] The courts below found fraud based on the allegation that there had been a misrepresentation of fact by the appellant in its suit. But, as stated earlier, this so-called misrepresentation or suppression of evidence *viz* as to the ownership of the Cessna aircraft is a disputed issue. And it requires a *viva voce* inquiry rather than determination merely by way of affidavit evidence. That would be the only safe and proper procedure to determine

such a serious allegation which in this case was fervently disputed. The appellant had adduced opposing evidence to show that the respondent knew from inception that the Cessna aircraft was registered in the name of Sprint Air Inc. The respondent too should have known from the registration number of that aircraft ie, N 700 BC, with the prefix letter 'N' is an American-registered aircraft, as contrasted to one registered in Malaysia which would bear the initial mark of '9M' in accordance to art. 20 of the Convention on International Civil Aviation 1944. It was also contended by the appellant that a simple search *via* the internet on the FAA website by clicking the Cessna aircraft's registration number of N700 BC would have revealed that the Cessna aircraft belonged to Sprint Air Inc, until today. Furthermore, the appellant had already stated in its statement of claim filed in October 2005, that it intended to purchase a Cessna aircraft bearing that registration number. And, in fact, it was upon the recommendation of the respondent that that Cessna aircraft was covered by way of an endorsement in the appellant's insurance policy on its Beach Baron aircraft, issued earlier. The respondent surely cannot now come to court with a simple affirmation in an affidavit to say that it could not find this evidence with reasonable diligence since 2004. Thus, in our view, the factual disputes are obvious and can only be resolved in a trial, with examination of witnesses for the court to make definite findings of facts rather than from merely relying on the affidavits supporting encl. 29 alone and come to a determination that the appellant was guilty of committing fraud on the court by concealing a material fact. It is for this reason that the law requires for a party seeking to impeach a judgment based on fraud to file a fresh action. Only then can there be a proper finding on whether the appellant had committed a deliberate fraud on the court.

[40] Faced with these credible counter allegations as found in the appellant's opposing affidavit, and in the absence of a *viva voce* enquiry on those disputed facts, the courts below should have ignored those disputed deposition of facts forming the basis of the alleged fraud. The courts in such a situation should only confine themselves and decide the outcome of the case by considering only the incontrovertible facts. In *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24; [1987] 1 MLJ 433,

a case involving a petition for the winding up of a company, with both sides presenting contradicting affidavits, the Privy Council in their advice stated that:

> If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts.

[41] The appellant further submitted that there is no known procedures in the RHC 1980 to allow encl. 29 (a summons in chambers application) to be entertained. Learned counsel cited the following rules which he said were inapplicable:

(i) Order 56 r. 3A of the Rules of the High Court 1980 covers the introduction of fresh evidence in appeals from Registrar to Judges. In this case the encl. 29 was firstly, not in the course of any appeal and secondly, there was in existence a valid sealed judgment against which all levels of appeal had been exhausted. O. 56 r. 3A does not allow the court to hear an application to hear allegedly fresh evidence when there is no matter before the court.

(ii) Order 18 r. 19(1)(a) or (d) of the Rules of the High Court 1980 is for interlocutory applications which only allows an application to strike out a pleading prior to judgment, not subsequent to judgment.

(iii) Order 42 r. 13 of the RHC 1980 refers to setting aside a judgment - a procedure already exercised by the respondent in 2006 *vide* encl. 6 to set aside the default judgment which was even heard on appeal by the Court of Appeal and Federal Court. A similar second application cannot be filed - (*Tenaga Nasional, supra*).

[42] We agree with above assertions of the appellant. In our view, the very filing of encl. 29 is inherently defective and unknown under our RHC, and should have been summarily dismissed by the High Court. We also make this observation on the application of the court's summary power to strike out a pleading under O. 18 r. 19 Rules of Court 2012 (successor to RHC 1980). Although the power to strike out is a wide discretion, it should be exercised with care and only when the threshold

A requirement of "an obvious and unsustainable case" can a pleading be struck out. In exercising it, and especially under r. 19(1)(a), the court must have regard to the "quality of an all the circumstances surrounding the plea (see *Lembaga Kumpulan Wang Simpanan Pekerja v. Kesatuan Kakitangan Lembaga Kumpulan*
B *Wang Simpanan Pekerja* [2000] 3 CLJ 81; [2000] 2 AMR 2119, FC). The court should also bear in mind that the effect of striking out a pleading is to completely deprive a plaintiff from having his day in court.

C **[43]** We are also of the view that, having considered the antecedents to encl. 29, that application for the admission of fresh evidence was misguided. If the affidavits of both parties had been carefully considered it would have been clear that the so-called fresh evidence was not new and readily available with a little
D earnest effort by the respondent. We make a passing observation on this issue only because it arose from encl. 29 and became the basis for the respondent's contention on lack of standing and fraud of the appellant.

E **[44]** We conclude by saying that once a regularly obtained order or judgment has been perfected, the court is *functus officio*. The matter as decided *vide* encl. 6 is thus *res judicata* and cannot be re-litigated. It needs to be emphasised that the order made under encl. 6 was appealed and affirmed right up to the Federal Court.
F It cannot now be revisited or reasserted under any guise in a subsequent proceeding. The issues raised by the respondent in encl. 29 could have been brought up during the appeal process. The law does not allow the respondent to have a second bite of the cherry and in the manner as it did. This passage from *Tenaga Berhad* explains the rationale:
G

> There was no merit in the appellant's argument that the second application to set aside the default judgment was justified because it was based upon a different ground from that relied upon in the first application. The doctrine of *res judicata* in its wider sense was
> H applicable in the present case. It was certainly open to the appellant to ground its first application on the basis that the default judgment was irregular. It was therefore an issue which properly belonged to the first application. But it chose not to rely upon that ground. Once the first application was dismissed, it was not open to the appellant to make a second application to set aside the
> I judgment on a different ground. It would amount to presenting one's case in installment which the law does not permit.

In our judgment too, the re-litigation of a regularly and properly concluded matter as determined by the court is prohibited by the wide doctrine of *res judicata*. The judicial process rests on the twin pillars of certainty and finality. A final order or a judgment must therefore be vigorously protected by this doctrine, a position taken by the common law courts ever since *Henderson* [1843].

Duty Of Insurance Brokers

[45] The respondent is an insurance broker, not an insurer. By definition, it means that it is "a person who, as an independent contractor, carries on insurance broking business and includes a reinsurance broker" (s. 2 Insurance Act 1996). Its business thus pertains to that of "soliciting, negotiating or procuring a policy with an insurer or the renewal or continuance of the policy, for the policy owner other than himself" (s. 2 Insurance Act 1996). A broker does not issue an insurance policy. That is the business of a licensed insurer.

[46] In this case, it is not in dispute that the respondent is a broker, and not a licensed insurer. It cannot thus be liable for any damages the appellant had with the latter under an insurance policy. However, the claim for damages by the appellant, pursuant to its writ was under tort, for which the respondent owed a duty of care to it. It was submitted by the appellant and we agree, that the respondent as a professional broker whose expertise was relied upon, was liable to it for professional negligence in not arranging a proper insurance coverage for the Cessna aircraft resulting in the insurer disclaiming liability and refusing to indemnify the appellant's loss. The answer to question 4 posed to us is thus in the positive.

Insurable Interest

[47] Question 5 pertains to the issue of insurable interest, which the Court of Appeal found that the appellant had none since it was not the legal owner of the Cessna aircraft. Thus, the appellant could not possibly succeed in its claim for damages. We think that this question need not be answered since the claim by the appellant against the respondent is under tort, based on the latter's negligence, for its failure to exercise reasonable skill and care as a licensed insurance broker. It is not a claim under the insurance policy for which we agree that the prerequisite of an

A insurable interest needs to be shown by a claimant. However, we wish to clarify that to determine whether the appellant had any insurable interest is not dependent on it being the legal owner of the aircraft alone. Insurable interest can be established either by ownership, possession or direct relationship to the subject matter
B of the insurance. Thus, one has an insurable interest if by taking out an insurance policy one gains a benefit from the preservation of that subject matter or suffers a disadvantage should it be lost. In *Standard Chartered Bank v. KTS Sdn Bhd* [2006] 4 CLJ 79, the Federal Court held that "to constitute an insurable interest the
C person insuring the property must have a legal or equitable interest in the property insured". The interest in the insured property is thus not confined to just a legal interest *per se*. To substantiate this proposition we refer to this paragraph on the categories of persons who have insurable interest in general insurance from
D *Halsbury's Laws of Malaysia,* vol. 4 at para. 60.034 which says:

> Broadly speaking, the following persons would be considered to have an 'insurable interest' in the subject matter in which they are respectively interested: owners of property; vendors and purchasers; landlords and tenants; bailors and bailees; pledgors
E and pledges; consignors and consignees; common carriers and other carriers; mortgagors and mortgagees; lienholders; shareholders in their shares; agents in their commission; a trader in his stock in trade and profits; a hirer in the thing hired; an insurer in his risk (right of reinsurance).

F **[48]** For these reasons above, this appeal is allowed with costs, and the orders made by the courts below on encl. 29 are set aside. The perfected judgment and order obtained earlier on by the appellant therefore remain valid and enforceable.

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